No. 92-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DESARROLLOS METROPOLITANOS, INC.,
Petitioner,

v.

TABER PARTNERS I, A New York General Partnership, MERIT BUILDERS, INC., MERIT BUILDERS, S.E., and VICTOR TORRES & ASSOCIATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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In contrast to the confusion pervading respondents' brief in opposition, the First Circuit's opinion clearly recognizes that two distinct questions must be answered in determining the principal place of business, and hence citizenship, of a corporation. The ultimate legal question is which of the corporation's various activities—managerial, operational, or otherwise—determine its principal place of business: the First Circuit recognized that several different tests (*e.g.*, "nerve center," "center of corporate activity," "locus of the operations") have been articulated to answer this question. Pet. App. 8a. *See also id.* at 23a ("total activities"). But, as the court of appeals also expressly recognized, there is a separate, threshold question: what activities count as activities of the corporation

for purposes of applying any such test? In particular, do the activities of a separate legal entity—the corporation's subsidiary, for example, or (here) a partnership of which the corporation is a controlling partner—ever count as those of the corporation, or, instead, must they be ignored, as a matter of law, whenever the entities themselves respect their *formal* separateness as legal entities, regardless of whether there is actual intermingling of responsibility or control? Pet. App. 8a-12a.

It is this question that presents an issue warranting this Court's review. The First Circuit gave a clear affirmative answer to the question, avowedly elevating form over substance. Pet. App. 9a-12a. The First Circuit also candidly recognized that its answer was contrary to the "alter ego" approach of the Fifth Circuit, which looks beyond form to operational realities. *See id.* at 9a-10a (citing as *"Contra"* two Fifth Circuit decisions recognizing non-formal "alter ego" doctrine; citing with approval D.C. Circuit *Pyramid* decision rejecting "alter ego" doctrine of Fifth Circuit; citing with approval Sixth Circuit *Schwartz* decision relying entirely on " 'formal separation' "). Nothing in respondents' brief dispels this acknowledged conflict, or supports the court of appeals' insistence on treating a partnership's activities as other than those of its partners, directly contrary to this Court's ruling in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), that partners and their partnership should *not* be distinguished in determining citizenship for diversity purposes. Indeed, respondents' brief reflects confusion about these issues at every turn.[1]

1. Respondents first try to deny the conflict with the Fifth Circuit. Br. in Opp. 4-10. But as the First Circuit itself (and the D.C. Circuit in *Pyramid Sec. Ltd. v. IB*

[1] Only the two Merit respondents have filed a brief in opposition. Taber has not defended the ruling below in this Court, even though what is at issue is the principal place of business, and hence citizenship, of its partners.

Resolution, Inc., 924 F.2d 1114, *cert. denied*, 112 S. Ct. 85 (1991)) recognized, there is a clear disagreement between the approach taken below, which looks *only* to formalities in deciding whether to cross the boundaries of separate legal entities, and the approach taken by the Fifth Circuit, which looks to actual intermingling of responsibility and control even among distinct entities that maintain their formal separation. Neither respondents' reliance on a treatise nor its references to Fifth Circuit decisions answers that simple point.

At the outset, respondents rely on a few sentences from *Moore's Federal Practice* (Br. in Opp. 6), but even those sentences—written prior to the decision in this case—do not deny the existence of different approaches, one formal, the other operational, to crossing corporate boundaries under the "alter ego" label. Indeed, the full passage from which respondents have drawn their quote plainly intimates recognition of just such a dichotomy: the sentences and paragraphs immediately following those quoted by respondents specifically discuss the very cases, including the Fifth Circuit cases, that apply the operational approach and that were cited as "*Contra*" by the First Circuit (Pet. App. 10a).[2] The treatise assumes the appropriateness of the overarching "alter ego" label, and is less than explicit about the conflict of approaches, for a simple reason: the text was written before the First Circuit decided this case, in which, for the first time, the court of appeals expressly repudiated the "alter ego" doctrine by name and as applied by the Fifth Circuit.[3] The conflict, clear from a first-hand look at the cases themselves, has now been made explicit.

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[2] 1 J. Moore, J. Lucas, H. Find, R. Freer, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.77[2.-5], at 800.101-800.102 (2d ed. 1993).

[3] Similarly, the text of the *Moore's* passage was written prior to the D.C. Circuit's decision in *Pyramid Sec. Ltd.*, reversing a decision of a district court—cited twice by *Moore's*, pp. 800.101 n.1, 800.102 n.8—that relied on the Fifth Circuit doctrine.

When respondents finally discuss Fifth Circuit cases directly (Br. in Opp. 6-10), they focus principally on the wrong issue. They discuss Fifth Circuit decisions on the ultimate question of the proper test for determining a corporation's principal place of business ("total activities," etc.), but that discussion is beside the point. The issue independently warranting review is the threshold question of when, if ever, other legal entities' activities may or must be considered in applying such a test. On this issue, however, respondents cannot dispel the conflict. They merely try to explain away as unique each of a succession of Fifth Circuit cases that, in what they do and what they say, in fact look beyond formalities (Br. in Opp. 7-9). This effort cannot overcome the plain fact that the Fifth Circuit has repeatedly recognized, as a rule of law, that inquiry into the principal place of business does not stop at formally maintained corporate borders. *See* Pet. 10-11 (citing cases).

2. Respondents briefly address the merits of the corporate-boundary question (Br. in Opp. 10-12), but their brief is as confused about the merits of the issue as it is about the conflict.[4] Respondents suggest that our position somehow requires the Court "to give the partnership a separate citizenship based on its principal place of business," thus repudiating *Carden*, *supra*. Br. in Opp. 10; *see also id.* at 5. But that suggestion is patently false. Moreover, it is respondents' (and the First Circuit's) view that is incompatible with *Carden*.

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[4] The final section of the brief in opposition discusses the ultimate question of the proper legal "test"—urging the "total activities" test, which, despite the district court's express reliance on it, the First Circuit did not even mention. Br. in Opp. 12-14. We note here simply that the petition for a writ of certiorari asks the Court to address that question, in order to provide helpful clarity for the lower courts, only as a companion to the corporate-boundary question, which is the question that warrants this Court's review.

The only question here is how to determine the principal place of business of a corporation that is a member of a particular partnership. There is no disagreement that (some or all of) such a corporation's activities determine its principal place of business; what is in dispute is whether the partnership's activities are *among* the activities that can be considered those of the corporation. Counting those activities in no way gives the partnership a separate citizenship based on *its* place of business. For example, the corporate partners each may have their citizenship in a place other than that of the partnership's business—*e.g.*, because the partnership activities are only a small part of far-flung activities of each corporate partner, each having its predominant activities or headquarters elsewhere—with the result that the partnership has its citizenship in all of those places but *not* where it does business. It is always the corporate partners' citizenship that controls, never any independent citizenship of the partnership.

Respondents, in the end, make the same mistake about *Carden*, and the relationship of partners to their partnership for diversity purposes, that the First Circuit made. *Carden* refuses to treat the partnership as distinct from its partners, giving the partnership the citizenship of each of its partners. Respondents and the First Circuit, however, then insist on treating the partnership as rigidly distinct from its partners in determining the partners' citizenship (when they are corporations). That view, on which the judgment below entirely turns, ignores the reality of direct partner responsibility for partnership activities and stands *Carden* on its head.

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, the Court should grant the petition in this case.

Respectfully submitted,

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Dated: July 15, 1993